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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 511

JAMES E. BUSH,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

POST-ARGUMENT BRIEF FOR THE PETITIONER

CHARLES ALAN WRIGHT
2500 Red River Street
Austin 5, Texas

BILLY J. MOORE
Citizens National Bank Building
Ennis, Texas

Attorneys for Petitioner

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This case was ordered for argument February 25th and argued February 26th. On February 23rd respondent filed a Supplemental Brief in which, with commendable candor, it advised the Court that on February 6th a psychiatrist chosen by the state had examined petitioner and found him "only partly or not at all responsible for his acts, for very many years." The Supplemental Brief further disclosed that on February 21st petitioner was transferred from the penitentiary to a mental hospital under the provisions of Article 932-1 of the Texas Code of Criminal Procedure.

Quite naturally much of the oral argument was devoted to the effect which these new facts should have on disposition of the case. It is clear that they do not make the case moot. Under § 11(b) of Article 932-1, petitioner "remains under the jurisdiction of the Texas Prison System,"

and it is further provided in § 15 of that article that petitioner is to be returned to the penitentiary "when the head of the State mental hospital determines that a prisoner whose sentence has not expired no longer requires hospitalization for mental illness or will not benefit from continued hospitalization." Nor was the Supplemental Brief a confession of error by respondent. Counsel for the state asserted flatly in open court that the state was not confessing error, and argued with vigor that there was no error and that the conviction should be affirmed, despite these recent developments.

It might be argued from *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 49 (1947), that the facts thus put forward by respondent have no proper bearing in this case other than to suggest the question of mootness. The Court, however, at oral argument, expressed considerable interest in whether it might be appropriate to vacate the judgment of the Texas Court of Criminal Appeals and remand the case to that court for consideration in the light of these facts. At oral argument the Assistant Attorney General declared that the facts in the state's Supplemental Brief were of "no legal relevance," and stated that there was no judicial remedy available to petitioner under Texas procedure by which relief could be given him on the basis of these facts. This was also the understanding of counsel for the petitioner, but since the matter had come up such a short time before argument, petitioner's counsel were not fully briefed on this question, and requested leave, granted by the Chief Justice, to file a post-argument brief limited to that question.

Further examination of the Texas law persuades petitioner that counsel for the state were right when they told the Court that no remedy could be afforded petitioner in the Texas courts on the basis of the facts now brought to

this Court's attention. The Texas statutes and decisions indicate rather clearly that: (1) no relief is available to petitioner in the Court of Criminal Appeals; (2) no relief is available to petitioner in the District Court; and (3) even if there were no procedural bar, it is highly doubtful whether Texas courts would give relief on this showing.

I.

The rule is well settled that the Texas Court of Criminal Appeals will not consider ex parte affidavits, or other similar matter outside the record, whether filed by the state or by the defendant. See *Boyce* v. *State*, 62 Tex.Cr. 374, 377, 137 S.W. 116, 118 (1911), and the many similar holdings cited in 5 *Tex.Jur.2d* § 115 (1959). The court put the matter this way in *Pye* v. *State*, 71 Tex.Cr. 94, 101, 154 S.W. 222, 226 (1913):

> It may be that in some cases facts are developed, after the trial of a case, which would cast some doubt as to the guilt of an accused person; but we are permitted to pass alone on the record as made in the trial of the case, for we are but to review the proceedings of that court. If the evidence sustains the verdict of the jury, and the court has committed no error, we have no option but to affirm the case.

Three cases, of many which might be cited, illustrate the rigidity with which the Texas Court of Criminal Appeals applies this rule. In *Turpin* v. *State*, 149 Tex.Cr. 179, 184, 192 S.W.2d 277, 279 (1946), after affirmance of a conviction for statutory rape, defendant made a timely motion for rehearing, appending an affidavit from the prosecutrix in which she retracted the testimony she had given at the trial. The court held that it could not consider such an affidavit

since it had not been made a matter of record in the district court at the proper time.

An even more aggravated case is *Ballew v. State*, 82 Tex.Cr. 398, 199 S.W. 1109 (1917). Ballew and Walchek were indicted for a crime. The cases were severed. Ballew went to trial in Waller County and was convicted. He was unable to call Walchek as a witness at his trial because of the Texas rule that a co-defendant is incompetent to testify for the defense until after he has been acquitted or the prosecution against him dismissed. Texas Code of Criminal Procedure, art. 711; 1 McCormick & Ray, *Texas Law of Evidence* § 339 (Ray & Young ed. 1956). After Ballew had been convicted, Walchek was tried in Grimes county and acquitted. On Ballew's appeal, he asked leave to file with the Court of Criminal Appeals the record of the Grimes county proceeding, and prayed for reversal and a new trial so that he might have the benefit of Walchek's testimony. The court refused to permit this, saying, at 399, 199 S.W. at 1109:

> As stated, all these proceedings in the Grimes county district court and the acquittal of Walchek occurred long after the trial of appellant in Waller county and many weeks after the court in Waller county had adjourned for the term at which appellant was convicted. A mere recital of these facts makes it clear and certain that this court is without power or authority to reverse this case on this ground. This court is an appellate court, not a trial court. It can hear no evidence on any such issue as is tendered by appellant herein. The decision of any case in this court must be made from the records brought up in the transcript on the trial in the court below. * * * So that this court cannot permit the filing of the said proceedings in the

Walchek case in Grimes county, nor consider them for any purpose.

Finally there is at least one case in which the Court of Criminal Appeals applied this rule to affirm a clearly erroneous conviction, even though both parties and the trial judge had agreed that matter not in the record might be presented. The case is *Donohue* v. *State*, 102 Tex.Cr. 151, 277 S.W. 657 (1925). Two persons were indicted separately, but for similar crimes, in a particular county. In each case motions were made attacking the failure to include the names of all qualified jurors in the jury wheel. In the first case the trial judge took evidence on the motion and denied it. In Donohue's case it was agreed by counsel, with the approval of the trial court, that the court would consider as being in evidence the facts which were introduced in the earlier case. The trial court then denied the motion. In the first case, there was reversal on appeal, since it was held that the jury had been improperly selected. Despite the agreement below to incorporate by reference the other testimony, the Court of Criminal Appeals held that the evidence in the first case was not a part of the record in Donohue's case, and since the record was then bare of any evidence in support of the motion, the court affirmed Donohue's conviction.

II.

In the present case, the material now brought forward by the state is in the nature of newly discovered evidence. The time has long since past when petitioner might apply for relief from the trial court on this ground. Such a motion must be filed within 10 days after conviction as evidenced by the verdict of the jury, Texas Code of Criminal Procedure, art. 755, although the court does have some

power to hear such a motion within the same term of court after expiration of the usual time for moving. *Atkinson* v. *State*, 164 Tex.Cr. 421, 299 S.W.2d 951 (1957). In this very case, petitioner moved in the trial court on July 15, 1961, for an extension of time to move for a new trial on the basis of newly discovered evidence. The motion was refused (R. 24-25), and the Court of Criminal Appeals held that "the court was without jurisdiction after expiration of the term to grant appellant's request for extension of time." *Ex parte Bush*, 353 S.W.2d 855, 858 (Tex.Cr. 1962). If the trial court lacked jurisdiction to grant such relief in 1961, it lacks jurisdiction to grant it in 1963.

There is a statutory procedure, under Texas Code of Criminal Procedure, art. 932b, § 3, by which, so long as this appeal is pending, application could be made to suspend the proceedings on the ground of present insanity. Such an application must be made to the trial court. *Gibbs* v. *State*, 165 Tex.Cr. 429, 308 S.W.2d 515 (1958). This procedure is wholly inadequate to provide petitioner the relief to which he believes he is entitled. It would not permit determination of whether he was insane at the time of the alleged crime or the time of his trial. It would merely suspend the proceedings against him, and he would be confined in a mental hospital "as a person charged with a criminal offense until he becomes sane." He would be denied the opportunity for furlough from the mental hospital which is available to one under a civil commitment. That this is not sufficient relief for a defendant who believes he has been unjustly convicted is evidenced by § 5 of art. 932b, which provides that "upon motion of a defendant's counsel an appeal from a conviction may be prosecuted."

Nor should petitioner be required to have his conviction affirmed, and seek some collateral remedy. It is very doubt-

ful whether there is any collateral remedy open to him. *Ex parte Elkins*, 168 Tex.Cr. 117, 324 S.W.2d 1 (1959), holds that habeas corpus is not available to challenge sanity at the time of a crime or of trial. Even if there were such a possible remedy, petitioner is entitled, on direct review of his conviction, to have it set aside if error was committed, rather than being forced to hunt, probably unsuccessfully, for some collateral remedy.

III.

Two Texas cases, somewhat resembling the present case, suggest that Texas would afford petitioner no relief even if there were no procedural bar to relief. In each case a death sentence was affirmed despite newly discovered evidence, presented in timely fashion to the trial court, raising doubt as to the sanity of the defendant. In *Covin* v. *State*, 130 Tex.Cr. 285, 93 S.W.2d 428 (1936), the defense did not know that alienists from a state hospital had examined defendant until they testified at the trial. The defense immediately moved for a continuance so that it might have its own psychiatric examination made, but the trial court denied the motion. Immediately after trial a motion for a new trial was made, accompanied with an affidavit of an alienist who had examined defendant for the defense after trial, in which the doctor stated that defendant was insane. The Court of Criminal Appeals affirmed the conviction. It found no error in the refusal of a continuance or in the denial of the motion for a new trial. It said, at 288-289, 93 S.W.2d at 430:

> If this court should ever lay down a rule that the accused was entitled to a rehearing or a new trial of his case in order that each newly discovered alienist or expert might have the weight of his testimony passed

> upon by a jury, it is quite evident that we would speedily reach a condition in our practice that one new trial after another might be demanded because of the discovery of this new alienist or the other, and, we might add, one after the other. We have no desire and have never intended to lay down such a rule.

Much the same situation was involved in *McCune* v. *State*, 156 Tex.Cr. 207, 211, 240 S.W.2d 305, 309 (1951), where the court said

> a halt must be called somewhere and * * * a new trial cannot be granted every time an alienist is discovered who will testify that appellant is insane.

In the *McCune* case the court did say that defendant might still seek the benefits of the statute dealing with insanity after conviction, but, as has already been pointed out, this would result only in a suspension of execution rather than a new trial or a vacation of the conviction.

CONCLUSION

Regrettable—and perhaps remarkable*—as it may seem, there appears to be no way in which petitioner can obtain relief from his conviction, despite the new evidence which the state has presented, save by reversal on the merits in this Court.

Respectfully submitted,

CHARLES ALAN WRIGHT
2500 Red River Street
Austin 5, Texas

BILLY J. MOORE
Citizens National Bank Building
Ennis, Texas

Attorneys for Petitioner

March 2, 1963

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*This is a case of the utmost seriousness, and counsel would not wish to treat it with levity. It does appear, however, that the fifth chorus of Dean Prosser's song, "The Common Law of Texas," is remarkably apt:

"It's the damnedest jurisdiction
Upon this planet sad,
Its whole judicial process
Is absolutely mad.
There's schizophrenia in New York,
Also in Illinois,
But the common law of Texas is
A psychiatric joy."

Law School Association Lyrics 70 (Prosser ed. 1962).